

**PORTFOLIO RESTRUCTURING AGREEMENT**

**by and between**

**The Director of the Office of Multifamily  
Housing Assistance Restructuring and**

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**a Participating Administrative Entity**

**Date: April 17, 2000**

ARTICLE 1.	DEFINITIONS .....	6
ARTICLE 2.	APPOINTMENT OF PAE .....	10
ARTICLE 3.	TERM OF AGREEMENT .....	10
ARTICLE 4.	PROJECTS SUBJECT TO AGREEMENT.....	11
ARTICLE 5.	PAE'S DUTIES .....	12
ARTICLE 6.	TENANT PARTICIPATION.....	16
ARTICLE 7.	PAE'S CONTRACTS WITH SUBCONTRACTORS .....	17
ARTICLE 8.	DUTIES OF DIRECTOR OF OMHAR.....	18
ARTICLE 9.	COSTS ASSOCIATED WITH PERFORMANCE OF CONTRACT; REIMBURSEMENT OF SPECIFIC SUBCONTRACTOR COSTS.....	19
ARTICLE 10.	PAE COMPENSATION .....	21
ARTICLE 11.	INDEMNIFICATION .....	23
ARTICLE 12.	LEGAL REPRESENTATION.....	24
ARTICLE 13.	REPRESENTATIONS, WARRANTIES AND COVENANTS .....	27
ARTICLE 14.	CONFIDENTIAL INFORMATION .....	28
ARTICLE 15.	BOOKS, RECORDS AND PAE OVERSIGHT .....	29
ARTICLE 16.	TERMINATION OF AGREEMENT; PROCEDURES UPON TERMINATION OR EXPIRATION OF AGREEMENT.....	31
ARTICLE 17.	MISCELLANEOUS PROVISIONS.....	34

**EXHIBITS**

**Exhibit 1:** Schedule of Projects

**Exhibit 2:** Operating Procedures Guide

**Exhibit 3 :** Key Personnel of PAE and Allocation of Time

**ATTACHMENTS**

**Attachment 1:** PAE's Debt Restructuring Commitment Review Procedure

**Attachment 2:** PAE-Furnished Computer Equipment

## PORTFOLIO RESTRUCTURING AGREEMENT

**THIS PORTFOLIO RESTRUCTURING AGREEMENT** (the "Agreement") dated and effective as of \_\_\_\_\_, 2000 ("Effective Date") between the Director of Office of Multifamily Housing Assistance Restructuring ("OMHAR") ("Director" or "HUD") and \_\_\_\_\_, a \_\_\_\_\_ formed under the laws of \_\_\_\_\_ with its principal place of business at \_\_\_\_\_ ("Participating Administrative Entity" or "PAE").

### PREAMBLE

**WHEREAS**, over 800,000 multifamily rental housing units in approximately 10,000 housing Projects have been financed with FHA insured loans and supported by project-based Section 8 housing assistance payment ("HAP") contracts pursuant to Section 8 of the United States Housing Act of 1937;

**WHEREAS**, in many cases, these HAP contracts currently provide for rents which substantially exceed the rents received by comparable unassisted housing units within the same local market;

**WHEREAS**, while annual HAP contract extensions for these Projects maintain an important housing resource, each year more HAP contracts expire, compounding the cost to the Department of Housing and Urban Development ("HUD") of annual renewals;

**WHEREAS**, the Multifamily Assisted Housing Reform and Affordability Act of 1997, Title V of Public Law 105-65 ("MAHRA"), approved October 27, 1997, limits renewals of most HAP contracts expiring in FY 1999 and thereafter to rent levels which do not exceed the rent of comparable properties in the same market area and authorizes participation by Owners with properties that have FHA-insured or Secretary-held mortgages whose rents are subject to the required reduction (each an "Owner, collectively, "Owners") in a Mark-to-Market mortgage restructuring program (the "Mark-to-Market Program");

**WHEREAS**, the Mark-to-Market Program will explore approaches to restructuring the debt secured by these properties while minimizing adverse impacts on tenants, Owners and communities;

**WHEREAS**, under the Mark-to-Market Program, Regulations were published on September 11, 1998, 63 FR 48926, in connection therewith (the "Regulations"), to provide rules by which mortgage restructurings under the Mark-to-Market Program will occur. Final Regulations will be published after comments are received on the Regulations;

**WHEREAS**, the Mark-to-Market Program provides that HUD may provide qualified

Participating Administrative Entities ("PAEs") with the opportunity to take over certain responsibilities of HUD for the restructuring of the Mark-to-Market Program Projects;

**WHEREAS**, MAHRA establishes an office within the Department of Housing and Urban Development known as the Office of Multifamily Housing Assistance Restructuring ("OMHAR") under the management of a Director;

**WHEREAS**, HUD has developed guidance for defining the role of the PAE in restructuring Projects in the form of a Mark-to-Market Operating Procedures Guide ("Operating Procedures Guide");

**WHEREAS**, the Owner has submitted all necessary documentation for participation in the Mark-to-Market Program, including a letter from the Owner which indicates the Owner's participation in the Mark-to-Market Program;

**WHEREAS**, the Director desires to retain PAE, and PAE desires to accept the Director's offer to act as a PAE under the Mark-to-Market Program to perform the services described in this Agreement upon the terms and conditions set forth below.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements set forth below and for other good and valuable consideration, the sufficiency of which is acknowledged by the parties hereto, Director and PAE agree as follows:

## **ARTICLE 1 -- DEFINITIONS**

When used in this Agreement, the following terms and phrases shall have the meanings identified below:

**Affected Unit of Local Government:** The unit of general local government with jurisdiction in which the Project is located.

**Affiliate:** When used with respect to a specified Person, a Person that:

- (a) directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with such specified Person;
- (b) is a director, officer, employee, trustee or general partner of, or an owner of an equity interest of ten percent (10%) or more or a beneficiary of a trust owning an equity interest of ten percent (10%) or more in, the Person specified or any Person specified in clause (a) above; or
- (c) is a member of the immediate family of the Person specified in clause (a) or (b) above or of any Investor or of any Direct Owner. For purposes hereof, the members of a Person's immediate family shall be such Person's parents, grandparents, spouse, children, grandchildren,

siblings and children of siblings.

For purposes of this definition, the term "control" (and any derivative thereof) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting stock, by contract or otherwise. For purposes of this Agreement, an Affiliate of the PAE shall include any contractor, Subcontractor or any other party engaged by the PAE in connection with its duties under this Agreement.

**Agreement:** Terms and provisions agreed to by and between the Director and the PAE comprising this Portfolio Restructuring Agreement and all attachments and exhibits hereto. This Agreement relates only to the rights and duties of the PAE, the Director and the Secretary as authorized by MAHRA and does not directly affect the rights and duties of the PAE, Director or Secretary under other contracts or agreements which may pertain to or interact with this Agreement.

**Base Fee:** The PAE's basic compensation for performing Rent Restructurings or Debt Restructurings, as more fully described in Article 10 of this Agreement.

**Closing:** Execution of all required documents necessary to implement the Restructuring Commitment and as further described in the Operating Procedures Guide.

**Closing Documents:** Documents approved and executed by the Director, the Project Owner and other necessary parties at the Closing of the Debt Restructuring Transaction, including second mortgage documents, Section 8 recapture agreements and other documents which finalize the Debt Restructuring deal.

**Day:** Calendar day.

**Debt Restructuring:** A transaction involving the modification of the Section 8 assistance subsidy and the modification or refinancing of the existing FHA-insured or HUD-held first mortgage, (in whole, or in part) pursuant to a Restructuring Plan and Use Agreement under 514 of MAHRA..

**Director:** The Director of the Office of Multifamily Housing Assistance Restructuring ("OMHAR"), created by the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRA"), and staff acting for the Director in accordance with delegated authority. In the event the Director no longer has authority to administer the program of mortgage and rental assistance restructuring, references to the Director shall mean the Secretary.

**Eligible Project or Project:** A multifamily rental housing Project which is financed by a mortgage insured or held by the Secretary, in which some or all of the units in the Project are covered by a project-based Section 8 HAP contract expiring on or after October 1, 1998 and which has rents which exceeded the rents for comparable properties in the area and otherwise meeting the definition of "eligible multifamily housing Project" in section 512(2) of MAHRA.

**Expiration:** The end of the Term, including any Extension, if any, of this Agreement as a result of the passage of time rather than by Director's Termination of the Agreement under Article 16.

**Extension:** As defined in Section 3.3.

**Fee:** As defined in Articles 9 and 10 (collectively, Base Fees, Incentive Fees and reimbursable payments, if any.)

**FHA Insurance Fund:** The General Insurance Fund or the Special Risk Insurance Fund, as appropriate, established under the National Housing Act.

**FMR:** Fair Market Rents, established pursuant to Section 8(c) of the United States Housing Act of 1937.

**HAP:** Housing Assistance Payments, as defined in the Preamble to this Agreement.

**HUD:** HUD means the Director of the Office of Multifamily Housing Assistance Restructuring (OMHAR) or a HUD official authorized to act in lieu of the Director, in accordance with delegated authority when used in reference to provisions of MAHRA that give responsibilities to the Director, and otherwise means the Department of Housing and Urban Development.

**HUD Counsel:** As defined in Section 12.1.

**Incentive Fee:** The PAE's compensation, as more fully described in Article 10 of this Agreement.

**Key Personnel:** PAE and Subcontractor staff assigned to complete the duties under this Agreement, as defined in Section 5.13 and as shown in Exhibit 3.

**Mark-to-Market Operating Procedures Guide:** The administrative procedures guidance, as defined in the Preamble to this Agreement, attached hereto as Exhibit 2, as amended from time to time in accordance with Section 5.14. ("Operating Procedures Guide")

**Mortgage Restructuring and Rental Assistance Sufficiency Plan:** See Restructuring Plan, below.

**Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRA"):** As defined in the Preamble to this Agreement.

**Office of Multifamily Housing Assistance Restructuring ("OMHAR"):** As defined in the Preamble to this Agreement.

**Optional Procedures:** All procedures appearing in the Operating Procedures Guide which are not specified as Required Work.

**Owner:** The holder of fee simple title to the Project, the lessee under a lease arrangement, or the purchaser under a land installment sales contract, but excluding an Owner as referred to in Section 516(a) of MAHRA.



**PAE Counsel:** Private counsel (including a law firm) hired by the PAE to perform legal tasks pursuant to this Agreement.

**Participating Administrative Entity:** The entity which executes this Agreement.

**Person:** Any individual, corporation, association, partnership, business trust, limited liability company, joint stock company, joint venture, trust, estate or other entity or organization of whatever nature.

**Portfolio:** As defined in Section 4.1.

**Proposed Restructuring Commitment:** A Restructuring Commitment that is prepared by the PAE and signed by the Owner but not yet approved and executed by the Director.

**Records:** As defined in Section 15.1.1.

**Rent Comparability Review:** The study performed by PAE to confirm whether the HUD Field Office's assessment that the Section 8 contract rents exceed comparable market rents is correct.

**Rent Restructuring:** A transaction involving the modification of the Section 8 subsidy that does not require a reduction of the existing FHA-insured or HUD-held first mortgage causing a Section 541(b) partial payment of claim. The two types of Rent Restructurings, as further described in the Operating Procedures Guide, are (1) a Tier 1 Rent Restructuring transaction using market rents and a limited expense, vacancy and other income analysis and (2) a Tier 2 Rent Restructuring transaction using market rents and a full expense, vacancy and other income analysis.

**Rental Assistance Assessment Plan:** The plan which determines whether Section 8 assistance will be renewed with project-based or tenant-based assistance, and as further described in Section 515(c)(2) of MAHRA.

**Required Work:** Those work items specified in Appendix V of the Operating Procedures Guide.

**Restructuring Plan:** The Mortgage Restructuring and Rental Assistance Sufficiency Plan developed by the PAE in cooperation with the Owner which incorporates the Rental Assistance Assessment Plan and which demonstrates how the PAE will, among other activities, assist in restructuring an FHA-insured or HUD-held mortgage, restructure and provide project-based or tenant-based assisted rents, require the Owner to rehabilitate the Project and maintain affordability restrictions, and as more specifically described in Sections 514 and 515 of MAHRA.

**Restructuring Commitment:** A document prepared by the PAE and executed by the Owner and Director setting forth the terms of the Debt Restructuring Transaction for a Project involving a contract renewal with Debt Restructuring, and which document incorporates a Restructuring Plan containing the information required by the regulations at 24 CFR 401.404.

**Secretary:** Secretary of the Department of Housing and Urban Development and staff acting for the Secretary in accordance with delegated authority. Reference to the Secretary may also mean the Director of OMHAR, if the Director is authorized to act on behalf of the Secretary.

**Services:** As defined in Article 2.

**Subcontractor:** A public or non-public entity with which the PAE contracts to carry out portions of the provisions of this Agreement, including, but not limited to, a due diligence Subcontractor.

**Subsidy Restructuring Recommendation:** For a Project, a recommendation by the PAE regarding whether a contract renewal of the Section 8 Assistance without Debt Restructuring, at rents not exceeding comparable market rents, is sufficient to maintain an adequate debt service coverage ratio on the first mortgage and necessary Project reserves to ensure the long-term physical integrity of the Project.

**Termination:** The ending of this Agreement and any Extension hereof by the Director or the PAE based on the occurrence of events or the exercise of rights described in Article 16.

**Tracking System:** The computer-based management information system specified by the Director to monitor the progress of the Debt Restructuring Transaction.

## **ARTICLE 2 -- APPOINTMENT OF PAE AND SCOPE OF SERVICES**

Director hereby retains PAE as an independent contractor for the sole purpose of performing the services, duties and obligations described in this Agreement, and PAE hereby agrees to perform such services, duties and obligations on the terms and conditions set forth below in accordance with applicable law, Regulations and the Operating Procedures Guide (the "Services").

## **ARTICLE 3 -- TERM OF AGREEMENT**

**3.1 Initial Term.** This Agreement shall have a term of one year commencing on the Effective Date and expiring at 11:59 p.m. EST or EDT on \_\_\_\_\_, 2001 (the "Term").

**3.2 Renewal.** The terms and provisions of this Agreement shall be renewed for additional one year periods, commencing the Day after the end of the Term, and ending no later than September 30, 2001 (or such later date that OMHAR and the Director are authorized by law to operate), unless the Director or the PAE provides written notice to the other, not less than thirty days prior to the end of the Term, that it does not wish to renew the Agreement. In the event the Director or the PAE does not wish to renew this Agreement, the Agreement will terminate either at the end of its Term, or as provided in Section 3.3 below, or pursuant to Article 16 below.

**3.3 Extension.** Subject to Article 16, the Term of this Agreement will be extended by a time period that the PAE requires to complete the restructuring of a specific Project assigned to the PAE (the "Extension"). (Except where specifically indicated otherwise, the noun "Term" as used hereafter in this Agreement shall refer both to the Term and to any renewal or Extension.

## **ARTICLE 4 -- PROJECTS SUBJECT TO AGREEMENT**

**4.1 Portfolio of Projects.** The Projects subject to this Agreement are identified on Exhibit 1 which may be amended from time to time to reflect the addition or withdrawal of Projects to the coverage of this Agreement as provided below. All of the Projects subject to the Agreement at any given time constitute the Portfolio (the "Portfolio").

### **4.2 Addition or Withdrawal of Projects.**

**4.2.1 Addition of Projects.** From time to time, the Director may add one or more Projects under this Agreement ("Additional Project" or "Additional Projects"). (Except where specifically indicated otherwise, the terms "Project" or "Projects" as used hereafter in this Agreement shall refer to a Project or an Additional Project.)

**4.2.2 Withdrawal of Projects.** From time to time, the Director may withdraw one or more Projects from the coverage of this Agreement if the Director finds that there is a conflict of interest regarding the Project, the Project is involved in litigation (including, but not limited to, enforcement proceedings against the Owner, or litigation concerning ownership of the Project), if the Owner withdraws from the Mark-to-Market Program or for other good cause affecting the ability or eligibility of a Project or Owner to undergo restructuring pursuant to this Agreement, and for any reason specified in Section 16.1. The withdrawal of Projects shall be accomplished as follows:

**(a) Procedure for Withdrawal.** Director shall withdraw a Project by notifying PAE of its decision to withdraw such Project and the reasons for withdrawal, and the withdrawal shall be effective thirty (30) Days following such notice, unless the Director provides otherwise. PAE shall, within said thirty (30) Days following notice, unless otherwise specified by the Director, transmit all Records relating to such Project to the Director, or to an entity or person identified by the Director, and shall cooperate with the Director to effect an efficient and smooth transition of responsibility with respect to such Project. In the event a Project is withdrawn, the Director may assign another Project.

**(b) Payment to PAE Upon Withdrawal.** In the event the Director withdraws a Project due to PAE's failure to perform in accordance with this Agreement, PAE will be paid amounts due at the point of withdrawal in accordance with Sections 10.2.1 and 10.2.2 plus reimbursement amounts which may be paid in accordance with Article 10 and Section 9.2. In the event the Director withdraws a Project for any reason set forth in Section 4.2.2, other than for the reasons specified in Section 16.1, the Director shall pay the PAE for its services an amount equal to the Base Fee next due pursuant to Sections 10.2.1 and 10.2.2, plus reimbursement amounts which may be due under Section 9.2 and Article 10. The aforesaid payments and reimbursements are paid to the PAE subject the Director's right to set off or recoup payments made to the PAE which were overpayments as determined by the Director. Payment to the PAE will be withheld until all records pertaining to the subject Project are returned to the Director.

## ARTICLE 5 -- PAE'S DUTIES

**Section 5.1 General Scope of Duties.** PAE shall perform the work required under this Agreement and the Operating Procedures Guide and perform such other related tasks as agreed to by the Director and PAE to restructure the Portfolio. The Required Work is specified in Appendix V of the Operating Procedures Guide, and must be performed in accordance with the corresponding provisions of the Guide. Optional Procedures are all other elements of the work appearing in the Operating Procedures Guide.

The PAE's work shall include, but not be limited to, in consultation with the Director, preparing for the Director's signature a Restructuring Plan, a Subsidy Restructuring Recommendation or Rent Comparability Review, and a Proposed Restructuring Commitment.

Prior to submitting to the Director any Proposed Restructuring Commitment with Debt Restructuring, the PAE shall, in consultation with the Director, prepare a Restructuring Plan for the Director's signature regarding the rents and type of Section 8 assistance, scope and cost of rehabilitation/repair work items and size of partial payment of claim. The submission to the Director shall comply with Part C of 24 CFR Part 401, entitled "Restructuring Plan," and the applicable provisions of the Operating Procedures Guide.

Prior to submitting to the Director for his signature, a Subsidy Restructuring Recommendation for a Rent Restructuring without Debt Restructuring, the PAE shall determine whether renewal of the Section 8 assistance at rents that do not exceed comparable market rents would be sufficient to maintain an adequate debt service coverage ratio on the first mortgage and necessary Project reserves to ensure the long-term physical integrity of the Project. As part of the Subsidy Restructuring Recommendation, the PAE shall also require the Owner to provide an evaluation

of the long and short term rehabilitation needs of the Project and contract for the competent management of the Project. The Owner shall make repairs and/or address how the short term rehabilitation needs of the Project will be addressed through Project or other funds available to the Owner. The submission to the Director shall comply with 24 CFR Section 401.601, and the applicable provisions of the Operating Procedures Guide. If the comparable market rents are sufficient, the PAE shall recommend that the Project's Section 8 assistance be renewed in accordance with 24 CFR Part 402 at rents that do not exceed the comparable market rents. However, if the PAE determines that the comparable market rents are insufficient, the PAE shall develop a Restructuring Plan as provided by the preceding paragraph. Those projects, for which the Director determines that only a Rent Restructuring is necessary, shall be referred to the appropriate HUD field office for purposes of processing the recommended and approved changes to the Section 8 subsidy.

Furthermore, from time to time the Director may request that the PAE perform a Rent Comparability Review to confirm whether an asset's Section 8 assistance contract rents are at or below comparable market rents. Compensation for the Rent Comparability Review is addressed in Article 10, below. Upon completion of this review, the PAE shall recommend either that the Director accept the Owner's determination that the rents are at or below market, or that the Director

require a Rent Restructuring of the rents and Debt Restructuring, if necessary, because the present Section 8 assistance is greater than the comparable market rent.

The PAE may not delegate to any other entity the duties under this Agreement without the prior written approval of the Director. PAE, however, may subcontract, pursuant to Article 7 below, with other entities to carry out the performance of its duties hereunder.

The PAE's duties are more fully described in the Operating Procedures Guide.

**5.2 Performance of Services by PAE.** The PAE, pursuant to Article 7, may engage Subcontractors at its sole cost and expense and in its sole name, except as reimbursement by the Director is specifically authorized, to assist in or undertake activities as may be necessary and appropriate under this Agreement.

### **5.3 Prohibition Against Transactions with Affiliates of PAE.**

**5.3.1** Except as otherwise provided herein, the PAE is expressly prohibited from entering into transactions or contracts with any Affiliate of the PAE in connection with the duties of the PAE hereunder, or this Agreement, the Restructuring Plan transactions or the Mark-to-Market Program. Any duties required to be handled by third parties must be undertaken pursuant to arms-length agreements with entities that are not Affiliates of the PAE.

**5.3.2** In no event shall the PAE, in completing the Restructuring Plan transactions on behalf of OMHAR, allow any Restructuring Plan to facilitate the sale of any of the Projects in the Portfolio, or of any interest therein, to the PAE, or any Affiliate, or party related to the PAE; or facilitate any benefit to the PAE or any Affiliate, either monetary or employment (as manager or otherwise) other than the Fees and financing consented to by OMHAR, in accordance with the Operating Procedures Guide.

**5.4 PAE Financing of Debt Restructurings.** PAE or an Affiliate of the PAE may provide financing in connection with the Debt Restructuring of a Project, if the PAE demonstrates to the Director's satisfaction that the financing being offered is the best available financing within the context of savings for the FHA Insurance Fund and Section 8 Assistance.

In support of its demonstration that the financing is the best available, the PAE, at a minimum, shall include with the Proposed Restructuring Commitment the following: (i) certification that PAE has negotiated with the Owner to provide the maximum supportable debt subject to prudent underwriting standards, including overall savings to the insurance fund; (ii) the Owner's certification that the PAE's proposed financing is competitive with the terms of other financing reviewed by the Owner; (iii) the Owner's certification disclosing any agreements between the Owner and PAE, other than the financing arrangement, which agreements may be subject to the Director's review to determine if there is any conflict with this Agreement; (iv) a certification by the PAE fully disclosing all consideration, direct or indirect, paid or to be paid to the PAE in connection with the financing; and, (v) a narrative by the PAE setting forth its rationale that, within the context of savings for the FHA Insurance Fund and Section 8

Assistance, the best available financing is being offered by the PAE.

The PAE shall also describe how it plans to resolve any potential conflict with regard to its role as PAE and lender. Furthermore, the provision of any such financing, either by the PAE or an Affiliate of the PAE, requires that the Director will subject the Debt Restructuring to a full technical review in accordance with the Operating Procedures Guide, unless the provided financing is insured under HUD's risk-sharing program and the entity providing the financing will share at least 50 percent of the risk. When risk-sharing financing will be provided, or when the PAE will provide financing which conforms to the criteria established for "conforming loans", as further described in the Operating Procedures Guide, the Director will subject the Debt Restructuring to a limited technical review in accordance with the Operating Procedures Guide. The PAE shall provide such other information and documents as requested by the Director regarding the PAE providing financing in connection with the Debt Restructuring of the Project.

**5.5 Transfer of Project.** For Owners who are disqualified from participation in the Mark-to-Market Program due to material adverse financial or managerial actions or omissions, the PAE may facilitate the voluntary sale or transfer of the Project with a preference for tenant organizations and tenant-endorsed community-based non-profit and public agency purchasers which meet qualifications for ownership established by the Director, as more fully described in the Operating Procedures Guide.

**5.6 Training ("Technical Assistance Briefings").** The PAE and, if necessary, its Subcontractors, must attend all technical assistance briefings offered by the Director. The PAE will be reimbursed for such travel costs pursuant to Section 9.2.6(a).

**5.7 PAE Standards of Performance.** PAE shall at all times act in good faith and in the best interests of the Director and shall carry out its duties with all deliberate speed. PAE shall use its best efforts and exercise all due care and sound business judgment in performing its duties under this Agreement. PAE shall at all times comply with all applicable statutes, regulations, policies, procedures and directives, including the Operating Procedures Guide, as they may be amended or promulgated by HUD from time to time during the term of this Agreement. The Director is authorized to review and evaluate the performance of the PAE in carrying out the PAE's duties under this Agreement. In the event a dispute between the Director and the PAE regarding the sufficiency or quality of PAE's performance under this Agreement cannot be resolved by the Director and the PAE, either party may request resolution of the dispute by an alternative dispute resolution mechanism. Use of an alternative dispute resolution mechanism will be at the sole discretion of the Director. Disputes regarding interpretation of MAHRA, the Regulations or other related statutes and regulations shall not be subject to any alternative dispute resolution mechanism. Moreover, the foregoing shall not limit, impede and/or hinder the Director from terminating this Agreement in accordance with Article 16 hereof.

**5.8 Implementation By PAE.** For each Project for which the debt is to have a Debt Restructuring, the PAE shall prepare, in cooperation with the Director, a Mortgage Restructuring and Rental Assistance Plan, in accordance with Section 514 of MAHRA, and a Rental Assistance Assessment Plan, in accordance with Section 515(c) of MAHRA. Both of these plans shall also comply with the requirements of the Regulations and the Operating Procedures Guide. The PAE shall ensure the aforesaid plans, as issued by the Director, are implemented through the Closing and post-Closing

document distribution stages of the Operating Procedures Guide. For each Project for which there is to be only a Rent Restructuring, the PAE shall prepare, for the Director's signature, a Subsidy Restructuring Recommendation.

**5.9 Approval of Proposed Restructuring Commitment.** PAE shall prepare, for the Director's signature, a Proposed Restructuring Commitment, which incorporates the Restructuring Plan issued by the Director. The Director shall approve the Proposed Restructuring Commitment as submitted, require changes thereto, or reject, with reasons given for the required changes or the rejection within 30 Days of receipt. In the event the Director's decision exceeds the 30 Day period, the excess time will not be included in the total amount of time it takes the PAE to complete the restructuring (for Incentive Fee purposes).

**5.10 Notifications to Director.** PAE shall promptly provide the Director with notice of any anticipated development or event adversely and materially affecting PAE's financial condition or its ability to perform its obligations under this Agreement.

**5.11 Conflicts.** PAE will notify the Director of any conflicts between the MAHRA, the Regulations, this Agreement and the Operating Procedures Guide.

**5.12 PAE's Approval of Proposed Restructuring Commitment and Subsidy Restructuring Recommendation.** The PAE shall develop procedures for its approval of a Proposed Restructuring Commitment and Subsidy Restructuring Recommendation. The PAE shall use an approval committee comprised of no fewer than three staff members of the PAE for approving the Proposed Restructuring Commitment and Subsidy Restructuring Recommendation. At least two of the three staff members shall not have participated in preparing the Proposed Restructuring Commitment or the Subsidy Restructuring Recommendation. The Proposed Restructuring Commitment or Subsidy Restructuring Recommendation, as approved by the PAE, shall be submitted to the Director for approval and execution pursuant to Section 8.3 below.

**5.13 PAE's Key Personnel.** Exhibit 3 identifies certain employees and Subcontractors of the PAE as important to the proper performance of PAE's duties under this Agreement ("Key Personnel") and the percentage of time allocated to performing the Services in accordance with this Agreement. The PAE agrees to obtain the Director's approval for any change in Subcontractors listed in Exhibit 3 or their replacements and will notify the Director of any changes in the Key Personnel of the PAE or Subcontractors listed in Exhibit 3 or their replacements, along with a summary of the qualifications of any substituted Key Personnel.

**5.14 Delivery of and Modification to Operating Procedures Guide.** The PAE has been provided with and has had an opportunity to review the Operating Procedures Guide in effect as of the date of this Agreement. From time to time the Director, at his sole discretion, may modify and make changes to the Operating Procedures Guide. Modifications to the Operating Procedures Guide shall be forwarded by the Director to the PAE either in hard-copy or electronically. The PAE shall implement changes to the Operating Procedures Guide within 30 Days of its receipt of such notice, unless otherwise specified by the Director. If the Director imposes a change to the Operating Procedures Guide which causes a substantial impact on the PAE's costs and expenses or time limits for performance of its restructuring

duties, the Director will take such change into account if the PAE requests a waiver in related fee limits or time limits. PAE shall be responsible for keeping current with the modifications to the Operating Procedures Guide.

## **ARTICLE 6 -- TENANT PARTICIPATION**

**6.1 Tenant Opportunity to Participate.** Prior to submitting to the Director any Proposed Restructuring Commitment or Subsidy Restructuring Recommendation, the PAE shall provide an opportunity for the Project's tenants and local community groups to comment on the development of a restructuring.

**6.2 Tenant Meetings.** The PAE must hold a minimum of two meetings with Project tenants to provide information regarding the restructuring and to provide an opportunity to comment on the Proposed Restructuring Commitment or Subsidy Restructuring Recommendation. Additional details regarding tenant meetings are found in the Operating Procedures Guide.

**6.3 Tenant Participation In Restructuring Process.** The Owner, through the terms of the HAP contract or riders or amendments thereto, shall be required to assist tenants and local community groups to effectively and timely participate in the restructuring process and shall permit tenant organizers access to the Project, at the request of tenants, for the purpose of assisting tenants to organize and participate in the restructuring pursuant to the terms of the Operating Procedures Guide. If the PAE becomes aware that the Owner is not assisting the tenants and local community groups in this manner, the PAE shall so notify the Director.

## **ARTICLE 7 -- PAE'S CONTRACTS WITH SUBCONTRACTORS**

**7.1 Subcontracts in Effect Upon Effective Date.** To the extent that there are in effect on the Effective Date of this Agreement contracts with subcontractors proposed to be used under this Agreement covering responsibilities or services that fall within the scope of this Agreement, PAE shall inform the Director of the extent to which the PAE proposes to use such Subcontractors and make certain that any such subcontract in place is consistent with the provisions of this Agreement, including the regulations pertaining to conflict of interest.



**7.2 PAE's Ultimate Responsibility.** Notwithstanding PAE's right to enter into subcontracts, PAE shall remain ultimately responsible and liable for the proper performance of the Services and management and performance of its duties and the duties of its Subcontractors in the performance of this Agreement.

**7.3 Contracts with Subcontractors.** PAE shall ensure that all subcontracts shall be consistent with the terms of this Agreement and PAE's duties hereunder. Among other provisions, each subcontract shall provide that:

**7.3.1** Subcontractor agrees to seek damages or other remedies solely against PAE, and not against the Director, the Secretary, HUD, the Owner or their respective officers, directors or employees, for any claim arising under the subcontract. (Collectively, the Director, the Secretary, HUD, the Owner or their respective officers, directors or employees shall be referred to as "Other Parties.") Subcontractor will acknowledge that it has no claims against the Other Parties or will waive any such claims it believes it may have against the Other Parties.

**7.3.2** Subcontractor shall maintain its Records, and agrees to make them available for inspection by the PAE, HUD's Inspector General and Director upon reasonable notice by PAE in a manner consistent with the requirements of Article 15 of this Agreement;

**7.3.3** Subcontractor shall treat non-public information in a manner consistent with the requirements of Article 14 of this Agreement;

**7.3.4** Subcontractor shall carry appropriate insurance coverage as directed by PAE; and

**7.3.5** Subcontractor may not assign the subcontract without PAE's prior written approval.

**7.4 Supervision of Subcontractors.** PAE shall monitor and supervise diligently the Subcontractors' performance of their duties under the subcontracts, including Subcontractors' supervision of their subcontracts, if any.

## **ARTICLE 8 -- DUTIES OF THE DIRECTOR OF OMHAR**

**8.1 Duties and Authority of the Director.** The Director has the duty to administer, on behalf of the Secretary, the program of mortgage and rental assistance restructuring for eligible multifamily housing Projects under MAHRA.

## **8.2 Provision of Project Files and Information to PAE.**

### **8.2.1 Project Files.**

**(a) Delivery of Files.** Director shall provide to PAE access to available Project files ("Project Files") and shall make such materials available to PAE or its Subcontractor in the appropriate Field Office location where PAE may photocopy such files as needed. Alternatively, the HUD Field Office staff may photocopy and deliver the Project Files to the PAE.

**(b) Custodial Relationship.** In holding the Project Files or copies thereof, PAE shall act as custodian for, and for the benefit of, the Director.

**8.2.2 Information.** Director shall furnish the PAE with information determined by the Director to be required for the orderly performance of PAE's duties under this Agreement, including information regarding changes in the Director's policies and procedures affecting any matter relevant to PAE's performance of this Agreement, although nothing herein limits the PAE's responsibility for keeping current with modifications to the Operating Procedures Guide in accordance with Paragraph 5.14 of this Agreement.

**8.3 Approval and Execution of Documents.** The Director shall have the sole right and authority in each Transaction to approve and execute the Proposed Restructuring Commitment, the Subsidy Restructuring Recommendation, any extension of the Section 8 HAP Contract, all Closing Documents and all other pertinent documents in accordance with applicable law and regulations. Should the Director take more than 30 Days to approve the Proposed Restructuring Commitment or the Subsidy Restructuring Recommendation, the excess time will not be included in the total amount of time it takes the PAE to complete the restructuring (for Incentive Fee purposes).

The Director, however, may elect not to approve a Proposed Restructuring Commitment or the Subsidy Restructuring Recommendation for the following reasons: (i) for any reason as specified in Section 516 of MAHRA; (ii) the PAE has not complied with, adhered to or otherwise followed the procedures and requirements of MAHRA, the Regulations, this Agreement or the Operating Procedures Guide; (iii) the PAE's conclusions or recommendations are not supported by the PAE's findings, analysis, studies or are otherwise unwarranted by the facts; or (iv) the proposed restructuring is not a cost effective use of Federal resources. The Director shall inform the PAE of the reasons for not approving the Proposed Restructuring Commitment or the Subsidy Restructuring Recommendation. The PAE will revise and resubmit to the Director the Proposed Restructuring Commitment or the Subsidy Restructuring Recommendation for approval. The Director will have another 30 Days to approve the resubmitted document.

**8.4 Compensation of PAE.** Director shall compensate PAE for its Services under this Agreement in accordance with the provisions of Articles 9 and 10 of this Agreement.

## **ARTICLE 9 -- COSTS ASSOCIATED WITH PERFORMANCE OF CONTRACT; REIMBURSEMENT OF SPECIFIC SUBCONTRACTOR COSTS**

**9.1 General.** Restructure of the Portfolio will include the completion of certain PAE and Subcontractor due diligence activities. PAE is responsible for advancing to its Subcontractors funds that may be needed to complete this work, with reimbursement for such advanced funds occurring in accordance with the provisions below.

**9.2 Reimbursement of Subcontractors.** HUD shall reimburse PAE for costs as follows:

**9.2.1 Appraisal Services.** The PAE shall be reimbursed up to \$6,000 for the cost of a limited scope appraisal in connection with a Debt Restructuring. To qualify for reimbursement, the appraisal shall be a limited scope appraisal which must meet or exceed the following criteria: (1) be a limited scope appraisal presented in summary form that complies with the Uniform Standards of Professional Appraisal Practices (USPAP), (2) be prepared by a third party State-certified general appraiser; and (3) be acceptable to OMHAR.

The \$6,000 reimbursement includes the cost of upgrading a market rent study to a limited scope appraisal. The Director will pay for only one limited scope appraisal or market rent study for each Project.

The PAE shall be reimbursed up to \$3,000 for the third party cost of a market rent study conducted in connection with a Rent Restructuring or a Rent Comparability Review. The market rent study must be prepared by a third party state-certified general appraiser.

The Director shall require the PAE to either obtain three (3) bids for an appraisal or employ another procurement process which has received the Director's prior approval. The PAE shall select the contractor that provides the best value to the Federal government, taking into account both quality and cost, which contractor need not necessarily be the lowest bidder. However, the \$6,000 and \$3,000 maximum payment requirements may be waived by the Director for good cause.

**9.2.2 Physical Condition Analysis (PCA) Reports.** The PAE shall be reimbursed for the costs of PCA Reports up to a maximum of \$4,000 each. Director shall pay for only one PCA Report for each Project. The Director shall require the PAE to either obtain three (3) bids for PCA Reports or employ another procurement process which has received the Director's prior approval. The PAE shall select the contractor that provides the best value to the Federal government, taking into account both quality and cost, which contractor need not necessarily be the lowest bidder. However, the \$4,000 maximum payment requirement may be waived by the Director for good cause.

**9.2.3. Legal Counsel.** The Director shall reimburse the PAE up to a maximum of \$5,000 per Project for payments made to counsel hired by the PAE to perform (i) the legal review of all mortgage documents to ensure that they are in conformance with the terms of the Restructuring Commitment approved by the Director and the standard Mark-to-Market closing documents, and/or (ii) legal research regarding federal law applicable to the restructuring process. Except for changes due to local law requirements, any deviations from standard Mark-to-Market closing documents must be brought to

the attention of the Director for appropriate action. If the PAE chooses to use Outside Counsel, the PAE must either obtain three (3) bids for outside legal services or follow another procurement process which has received the Director's prior approval. The PAE shall select the contractor that provides the best value to the Federal government, taking into account both quality and cost, which contractor need not necessarily be the lowest bidder. If the PAE employs counsel on staff it may elect to use such counsel to perform the services contemplated. The Director shall reimburse the PAE for legal services provided under this Agreement by its counsel on staff at the PAE at the salary rate currently paid to the counsel plus associated overhead and benefits, so long as the PAE supplies adequate supporting documentation to the Director. The \$5,000 payment maximum may be waived by the Director for good cause.

**9.2.4 Environmental Assessment.** The Director shall pay the PAE up to \$1,000 for completing the environmental checklist or shall reimburse the PAE for payments made to a Subcontractor who completes the environmental checklist. In the event there are adverse findings and the findings are documented by the PAE or Subcontractor, the PAE may seek from the Director approval for further environmental assessments and additional payment or reimbursement.

**9.2.5. Multiple Project Solicitation.** Each request for bids issued by the PAE under sections 9.2.1, 9.2.2 and 9.2.3 above, may solicit services for multiple Projects.

#### **9.2.6 Travel.**

**(a) Travel for Technical Assistance Briefings.** The Director shall reimburse the PAE for reasonable costs associated with travel by the PAE and its Subcontractor after execution of this Agreement to technical assistance briefings and other Mark-to-Market Program activities required by the Director. Reimbursement will be at cost, up to a maximum of \$5,000 per trip to each technical assistance briefing for all participants combined.

**(b) Travel Related to Debt Restructuring.** The PAE shall be reimbursed up to a total of \$3,000 for each Project for travel related to a specific Debt Restructuring Transaction, which payment limitation may be waived by the Director for good cause.

**(c) Additional Travel Reimbursement Limitation.** In addition to the limitations provided for in Subsections (a) and (b) above, reimbursement for travel costs also are subject to government travel per diem restrictions as well as restrictions on the methods and class of transit. set forth in 48 CFR 31.205-46.

**9.2.7 Other Subcontractors.** The Director shall reimburse the PAE for costs associated with other necessary Subcontractors, provided the Director's prior written approval is obtained for any and all costs in excess of \$2,500. For all subcontracts, the PAE shall exercise sound business judgment and take steps to ensure that the subcontract provides the best value to the Federal government, taking into account both quality and cost.

**9.3 General Reimbursement Requirements.** The Director shall reimburse PAE up to the limits specified above upon the PAE's presentation to HUD of an invoice from the PAE or a Subcontractor,

accompanied by an approval signed by the PAE that costs incurred or the work performed by the PAE or Subcontractor are acceptable and complete. Any request for reimbursement of work performed by the PAE or costs incurred by the PAE must also be accompanied by a certification that the costs of the work performed by the PAE or incurred by the PAE is in conformity with the normal and customary costs charged for equivalent services in the geographic locale by Subcontractors and comply with other applicable HUD guidelines. If the PAE can demonstrate that the normal and customary costs for these items exceed the maximum reimbursement amounts stated above, the PAE may request, in writing, that the Director waive the maximum reimbursement amounts. The Director shall comply with the applicable provisions of the Prompt Payment Act, 31 U.S.C. 3901, et seq., as amended, when reimbursing PAE.

## **ARTICLE 10 -- PAE'S COMPENSATION**

**10.1. General.** In exchange for services rendered pursuant to the terms of this Agreement, the Regulations and the Operating Procedures Guide, the PAE will receive a Base Fee, will be

reimbursed for certain expenses, and will be eligible to receive Incentive Fees for achieving the goals established in Section 10.3. below.

### **10.2. Base Fees.**

**10.2.1. Debt Restructurings.** The PAE will be paid a Base Fee of \$\_\_\_\_\_ per Project assigned for a completed Debt Restructuring. The Base Fee will be paid in the following increments:

30% upon the PAE's completion of due diligence and data collection,

40% upon the Director's execution of the Restructuring Commitment,

30% within 30 Days after Closing and the Director's receipt of the PAE's certification that post-closing document distribution has been completed.

If the PAE processes a Rent Restructuring which is subsequently converted to a Debt Restructuring, the PAE will be paid the maximum Base Fee indicated above in this Section 10.2.1. However, the Base Fee will be paid as follows:

\$\_\_\_\_\_ for a Tier 1 Rent Restructuring or \$\_\_\_\_\_ for a Tier 2 Rent Restructuring, as applicable, payable upon the Director's approval of the conversion of the Rent Restructuring to a Debt Restructuring,

30% of the Base Fee (i.e.: less \$\_\_\_\_\_ or \_\_\_\_\_ paid above), payable upon completion of the due diligence and data collection,

40% of the adjusted Base Fee, payable upon the Director's approval of the Restructuring Plan,

30% of the adjusted Base Fee, payable 30 Days after Closing and the Director's receipt of the

PAE's certification that post-Closing document distribution has been completed.

**10.2.2 Rent Restructurings.** If the owner requests a Debt Restructuring and the Project is assigned to the PAE for a Debt Restructuring, but after starting the Debt Restructuring the PAE determines that either a Tier 1 or Tier 2 Rent Restructuring is required, the PAE will be paid a Base Fee of \$\_\_\_\_\_ per Project for processing the Rent Restructuring.

When the Owner requests a Rent Restructuring, the PAE will be paid a Base Fee of \$\_\_\_\_\_ per Project if the transaction is processed by the PAE as a Tier 1 Rent Restructuring and the HUD field office or program center is notified of the Rent Restructuring. The PAE will be paid a Base Fee of \$\_\_\_\_\_ per Project if the transaction is processed by the PAE as a Tier 2 Rent Restructuring and the HUD field office or program center is notified of the Rent Restructuring.

The Base Fee for a Rent Restructuring will be paid upon the Director's acceptance of the PAE's submission of the Required Work products as specified in Appendix V, Part B (dated December 15, 1999) of the Operating Procedures Guide, and documentation that the PAE has delivered the unit rent recommendations, approved by OMHAR, to the Section 8 Contract Administrator for the project.

If the Owner requests a Rent Restructuring and the Project is assigned to the PAE for a Rent Restructuring, but after starting to process the Rent Restructuring the transaction is converted to a Debt Restructuring, the PAE will be paid in accordance with Section 10.2.1 above.

**10.3 Incentive Fees.** The PAE may earn fees in addition to the Base Fee if the PAE accomplishes certain goals as follows: (payable 30 days after the later of the Closing or the Director's receipt of the PAE's certification that post-closing document distribution has been completed.)

**10.3.1. Market Rent Debt Restructurings.** When the PAE conducts a Debt Restructuring using market rents, the maximum Incentive Fee that may be earned by the PAE is \$10,000 by meeting the requirements of subsections (a), (b), (c), and a choice of either subsection (d) or (e) below:

**(a) Processing Time.** If the Closing occurs within 9 months after assignment of the Project, the PAE shall be paid \$2,500.

The PAE shall not receive an Incentive Fee if the Closing occurs more than 9 months after assignment of the Project to the PAE.

**(b) Public Interest Survey.** The PAE shall be paid \$2,500 if, based on an objective survey of the Project tenants, the Director determines that the PAE has provided outstanding service in addressing the tenants' questions and concerns regarding the Debt Restructuring and has protected the public interest regarding promoting the availability of decent and affordable housing.

**(c) Cost Savings.** The PAE shall be paid \$2,500 if the ratio of the net present value of the Section 8 subsidy savings over 20 years divided by the section 541(b) partial payment is greater than 1.0.

**(d) Cost Savings.** The PAE shall be paid an additional \$2,500 if the ratio of the net present value of the Section 8 subsidy savings over 20 years divided by the section 541(b) partial payment is 1.1 or greater.

**(e) Use of Outside Financial Resources to Reduce Section 541(b) Payment.** The PAE shall be paid \$2,500 if the PAE causes an infusion of funds which has the effect of decreasing the section 541(b) payment by more than 10% of the section 541(b) payment calculation without the outside resources. In any case, the amount of the section 541(b) payment reduction shall be not less than \$25,000.

**10.3.2. Exception Rent Debt Restructurings.** When the PAE conducts an exception rent Debt Restructuring using exception rents, the maximum Incentive Fee that may be earned by the PAE is \$7,500 by meeting the requirement of subsection (a), (b) and one of either subsections (c) or (d) below. The fee elements are as follows:

**(a) Processing Time.** If the Closing occurs within 9 months after assignment of the Project, the PAE shall be paid \$2,500.

The PAE shall not receive an Incentive Fee if the Closing occurs more than 9 months after assignment of the Project to the PAE.

**(b) Public Interest Survey.** The PAE will be paid \$2,500 if based on a survey of the Project tenants, the Director determines the PAE has provided outstanding service throughout the Debt Restructuring process in addressing the tenants' questions and concerns and has protected the public interest regarding promoting the availability of decent and affordable housing.

**(c) Cost Savings.** The PAE shall be paid \$2,500 if the ratio of the net present value of the Section 8 subsidy savings over 20 years divided by the section 541(b) partial payment of claim is 1.0 or greater.

**(d) Use of Outside Financial Resources to Reduce Partial Payment of Claim.** The PAE shall be paid \$2,500 if the PAE causes an infusion of funds which has the effect of decreasing the section 541(b) payment by more than 10% of the section 541(b) payment calculation with the use of outside resources. In any case, the amount of the Section 541(b) payment reduction shall be not less than \$25,000.

**10.3.3 Rent Restructuring.** For a Tier 1 Rent Restructuring, the PAE will earn an Incentive Fee of \$1,250, per Project if the PAE completes and submits to the Director the Required Work products within 75 Days of assignment of the Project to the PAE and such submission is accepted by the Director. For a Tier 2 Rent Restructuring, the PAE will earn an Incentive Fee of \$1,250 per Project if the PAE completes and submits to the Director the Required Work products within 90 Days of assignment of the project to the PAE and such submission is accepted by the Director. The Required Work products are as specified in Appendix V, Part B (dated December 15, 1999) of the Operating Procedures Guide.

Notwithstanding the above, when a Project has been assigned to the PAE for a Debt Restructuring, but after starting the Debt Restructuring process, the PAE determines that a Debt Restructuring is not required and that a Rent Restructuring is sufficient, the PAE will earn an Incentive Fee of \$1,250 per Project if the PAE completes and submits to the Director the Required Work for the Rent Restructuring within 6 months of assignment of the Project to the PAE and such submission is accepted by the Director, as specified in Appendix V, Part B (dated December 15, 1999) of the Operating Procedures Guide.

The Incentive Fee will be paid to the PAE 30 Days after the Director's acceptance of the PAE's Required Work product as specified in Appendix V, Part B (dated December 15, 1999) of the Operating Procedures Guide.

**10.4 Reimbursable Expenses.** The PAE will be eligible for reimbursement for the following services:

**10.4.1. Rent Comparability Review.** The PAE will be paid \$1,500 per Project for performing the Rent Comparability Review as described in the Operating Procedures Guide. The required work products, as specified in Appendix V, Part C (dated April 17, 2000) of the Operating Procedures Guide should be submitted within 75 days of assignment of the project to the PAE. The fee will be paid to the PAE upon the Director's review and acceptance of the Rent Comparability Review. In the event the Project is assigned to the PAE for Restructuring, the \$1,500 fee will count toward the PAE's total Base Fee compensation for the Restructuring transaction. Reimbursement to the PAE for the cost of the market rent study is addressed in Section 9.2.1 Appraisal Services.

**10.4.2. Other Reimbursables.** Reimbursement requirements for appraisals, physical condition analysis, legal counsel, environmental assessment, travel for Technical Assistance Briefings, Subcontractors, and travel related to Project restructurings are covered in Article 9.

**10.4.3. Transfer of Physical Assets.** The PAE is not required to perform any services relating to the transfer of physical assets until the tasks have been agreed upon, in writing, between OMHAR and the PAE. In the event the PAE performs services related to a transfer of physical assets prior to an agreement between OMHAR and the PAE, OMHAR will reimburse the PAE for its reasonable costs and expenses in performing the work.

**10.4.4. Management or Financial Reviews.** Upon OMHAR concurrence with a PAE determination that a formal management review or financial review for the Director is warranted

using the protocol specified in HUD Handbook 4381.5, REV-2, Chapter 1, the Director will reimburse the PAE for its reasonable costs and expenses in performing the review.

## **ARTICLE 11 - INDEMNIFICATION**

**Section 11.1 PAE's Indemnification of the Secretary.** The PAE shall not take any action: (i) which is not permitted by this Agreement or not in accordance with the Restructuring Commitment executed by the Director or Subsidy Restructuring Recommendation executed by the Director; (ii) which is not



within the scope of the PAE's duties under this Agreement; (iii) which is not within the PAE's express authority under this Agreement; (iv) which amends any document which is a part of this Agreement or incorporated in this Agreement without the Director's approval; (v) which fails to comply with HUD's statutes, Regulations, policies, procedures, directives and guidelines applicable to this Agreement; or (vi) which would constitute a violation of any Federal, State or local law. PAE is liable for, and shall reimburse the Secretary for losses, claims, damages, liabilities or related expenses as determined by a court of competent jurisdiction after exhaustion of all appeals, or penalty costs or litigation settlement costs as approved and paid by the Secretary, which result from PAE's or its Subcontractor's actions involving willful misconduct or negligence or which are not permitted by the terms of this Agreement. PAE and the Secretary, however, may agree that the Secretary is not required to exhaust all appeals before receiving amounts covered by this indemnification.

## **ARTICLE 12 -- LEGAL REPRESENTATION**

**12.1 Use of PAE's Own Counsel.** PAE may retain counsel or use staff counsel to advise the PAE regarding its rights and obligations under this Agreement. If PAE does so, it shall bear its own expenses incurred in connection with any such legal services. Legal fees incurred by PAE and Subcontractors in carrying out its duties hereunder shall be the responsibility of PAE as provided in the Operating Procedures Guide and shall not be reimbursed by the Secretary, unless deemed to be a reimbursable legal document review expense or legal research expense pursuant to Section 9.2.3 above or a litigation related expense pursuant to Section 12.2. below or a non-public information review expense pursuant to Section 14.2 below. However, subject to the Director's prior written approval, the PAE may be reimbursed for reasonable legal fees associated with the settlement of threatened litigation or penalty assessments that the Director and HUD deem to be valid and imminent. Legal interpretations of the Mark-to-Market Program's statutory authority and the Regulations published in the Federal Register shall be made only by HUD's Office of General Counsel ("HUD Counsel") after reasonable consideration of the PAE's position.

### **12.2 Notice of Claims; Control of Litigation and Claims.**

**12.2.1 Notice of Claims.** PAE shall promptly notify the Director and the Secretary, and the Director or Secretary shall promptly notify the PAE in writing of any and all litigation and claims which to their knowledge have been made or threatened against the Projects, Secretary, Director, HUD, or PAE or any Subcontractor, or any officer, director, secretary, partner, employee or agent of any of them in connection with this Agreement or otherwise in connection with the Mark-to-Market Program.

#### **12.2.2 Control of Litigation and Claims.**

(a) The Secretary shall control all litigation and claims made or threatened against the Projects, the Secretary, the Director, HUD, and the PAE or any officer, director, partner, employee or agent of any of them in connection with the performance of this Agreement or otherwise in connection with the Mark-to-Market Program, provided that the Secretary shall consult with the PAE to the extent that the defenses or claims it asserts in such litigation (or in connection with such claims) affect or have a reasonable likelihood of affecting the rights of the PAE, and

the PAE shall cooperate with the Secretary to the extent necessary to permit the Secretary to defend or prosecute such litigation.

If the PAE believes that the Secretary's position in the litigation is directly adverse to its position, the PAE may pursue its own defense separate and apart from the Secretary's. In this event, the PAE shall be responsible for its legal expenses.

(b) The PAE Counsel shall control all litigation or claims made or threatened solely against the PAE or any officer, director, partner, employee or agent of the PAE, in connection with the performance of this Agreement or otherwise in connection with the Mark-to-Market Program, provided that the PAE shall immediately provide written notice of any such litigation or claims. If the Secretary, or his legal representative, determines that there is a federal interest, the Secretary, through the Department of Justice, may elect to participate, in which case the matter shall be handled in accordance with Section 12.2.2(a). In any event, the PAE shall consult with the Secretary to the extent that the defenses or claims it asserts in such litigation (or in connection with such claims) affect or have a reasonable likelihood of affecting the rights of the Secretary, the Director, or HUD, and the Secretary shall cooperate with the PAE to the extent necessary to permit the PAE to defend or prosecute such litigation.

(c) Nothing in this section 12.2.2. shall prevent either the PAE or the Secretary from taking action available to it under Federal or State law to implead or otherwise join the Secretary or PAE in the action brought against it.

### **12.2.3. Reimbursement of Legal Expenses.**

Should the PAE, or any officer, director, partner, employee or agent thereof, become directly or indirectly involved with litigation or a claim as the result of performing its duties under the authority of this Agreement, whether as a joint or sole defendant, the Secretary shall reimburse PAE for any reasonable legal costs and expenses, including but not limited to, reasonable attorney's fees (including fees for PAE Counsel) the PAE incurs by participating in such litigation or claim ("Litigation Costs") provided that the Secretary determines that the Litigation Costs are reasonable and appropriate for the litigation services rendered. The Secretary shall reimburse the PAE for legal expenses through regular billing pursuant to Section 9.3. If the PAE is required by the court to post a bond pending appeal, the Secretary shall reimburse the PAE for the cost of the bond. Notwithstanding anything to the contrary above, the Secretary shall not be obligated to pay Litigation Costs and shall be entitled to reimbursement of any funds paid to the PAE for Litigation Costs if the Secretary makes a determination that the PAE's actions, which are the subject of the litigation or claim, were not performed pursuant to the authority of this Agreement. Subject to the Director's prior written approval, the PAE may be reimbursed for reasonable legal fees associated with the settlement of threatened litigation or penalty assessments that the Director and HUD deem to be valid and imminent.

**12.3 Representation of Owners.** PAE Counsel retained in connection with this Agreement or the Mark-to-Market Program may not, during the period which counsel is so retained, provide legal

services to any Owner or any other party, except the Director, HUD or another participating administrative entity, with regard to any Project under the Mark-to-Market Program or with regard to any party or entity in any enforcement proceeding with HUD. After PAE Counsel's employment under this Agreement has been terminated, PAE Counsel may not represent an Owner or any other party in any Mark-to-Market matter relating to those Projects assigned to the PAE under this Agreement during the period counsel was retained by the PAE.

**12.3.1 Limitations.** In connection with this Agreement, without the prior written consent of the HUD Counsel, the PAE has no authority to do the following: (i) initiate litigation, (ii) make or accept settlement offers or (iii) undertake an appeal from an adverse judgment.

## **ARTICLE 13 -- REPRESENTATIONS, WARRANTIES AND COVENANTS**

**13.1 Representations and Warranties of Director.** Director represents and warrants as follows:

**13.1.1** Director, has the power and authority required to execute, deliver and perform this Agreement.

**13.1.2** Director's execution, delivery and performance of this Agreement have been duly authorized by all necessary official action.

**13.1.3** This Agreement constitutes a legal, valid and binding agreement of the Director, enforceable against the Director in accordance with its terms.

**13.2 Representations, Warranties and Covenants of PAE.**

**13.2.1 Representations and Warranties.** PAE represents and warrants as follows:

(a) It has full power and authority to execute, deliver and perform this Agreement; it is an entity duly organized, validly existing and in good standing under the laws of the State or locality of its formation and with full power and authority to execute, deliver and perform this Agreement;

(b) The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action of PAE;

(c) This Agreement constitutes a legal, valid and binding agreement of PAE, enforceable against PAE in accordance with its terms, except as limited by bankruptcy, insolvency, receivership and similar laws from time to time in effect;

(d) PAE possesses all necessary licenses, permits and approvals required to execute, deliver and perform the Services and its duties under this Agreement and is qualified to do business in all jurisdictions where such qualification is required for PAE's performance of its duties under this Agreement;

(e) To the best of PAE's knowledge, there is no litigation pending or threatened which would

adversely impede or prevent PAE's execution and performance of this Agreement, or which poses a conflict of interest in which the PAE is taking an adverse position in litigation, an administrative proceeding or other contested matter with HUD or an Owner whose Project is covered by this Agreement; and

(f) The representations and warranties made in the documents submitted as part of the PAE's response to the Request for Qualifications, as may have been updated by the PAE, are true and correct as of the date of this Agreement.

(g) The computer hardware and software to be used by the PAE in performing under this Agreement currently is compatible with the standards listed in Attachment 2 hereto.

**13.2.2 PAE Covenants.** PAE covenants that it will comply with, and will cause each Subcontractor to agree in its agreement or subcontract with PAE to comply with, all applicable Federal and State laws and regulations, including the Operating Procedures Guide, in performing its and their respective responsibilities under this Agreement and the subcontracts.

**13.3 Opinion of Counsel.** If deemed necessary in the sole discretion of the Director, PAE shall provide Director with an opinion of counsel confirming the matters set forth in 13.2.1(a)-(e) above.

## **ARTICLE 14 -- CONFIDENTIAL INFORMATION**

### **14.1 Confidentiality of Nonpublic Information.**

**14.1.1 Definition of Nonpublic Information.** For purposes of this Agreement, all information that the Director provides or causes to be provided to PAE in connection with its duties under this Agreement shall be deemed to be nonpublic ("Nonpublic Information"), unless such information is otherwise available to the public or made subject to disclosure under this Agreement. Subject to the foregoing, Nonpublic Information also shall include: (a) any specifications, knowledge, strategies or technical data, processes, business documents or information, marketing research and other data, customer or client lists or sources of information which are owned, possessed or used exclusively by or for the benefit of the Director; and (b) confidential information or materials obtained by PAE from a third party in connection with PAE's performance under this Agreement. Nonpublic Information shall be treated subject to the provisions of this Article 14.

**14.1.2 Duty to Maintain Confidentiality of Nonpublic Information.** The PAE shall strictly comply with the requirements of any applicable laws and HUD in dealing with all Nonpublic Information it obtains in connection with its performance under this Agreement, and, except as required by any law, court order, subpoena or by the Director, or as required to perform PAE's duties under this Agreement, neither PAE nor its Related Entities shall disclose Nonpublic Information to anyone, nor shall they use or allow the use of any Nonpublic Information to further any private interest other than as contemplated by this Agreement. The PAE shall take appropriate measures in accordance with the requirements of Federal law and HUD to ensure the confidentiality of all Nonpublic Information and to prevent its inadvertent or unintentional disclosure or its inappropriate use by the PAE or its subcontractors, by its

or their employees or Affiliates. The duties described under this Section 14.1.2. shall survive the Expiration or Termination of this

Agreement. At all times such information shall remain the sole property of the Department of Housing and Urban Development.

**14.2 Notice of Orders Requiring Disclosure of Nonpublic Information.** The PAE shall immediately notify the Director and the Director or Secretary shall immediately notify the PAE in writing of any subpoena or court order requiring disclosure of Nonpublic Information in accordance with State and Federal law. The PAE, at the Director's direction, shall appeal or challenge such subpoena or court order before disclosure, and shall cooperate fully with the Director in challenging any subpoena or order requiring the disclosure of Nonpublic Information. PAE shall be reimbursed for legal expenses incurred in challenging Nonpublic Information requests as stated in Section 12.1 above. PAE shall have no authority to disclose Nonpublic Information except in conformity with this Article 14.

## **ARTICLE 15 -- BOOKS, RECORDS AND PAE OVERSIGHT**

### **15.1 Recordkeeping and Reporting Requirements.**

#### **15.1.1. General.**

**(a) Maintenance of Substantiating Documentation.** At all times during the Term of this Agreement, PAE shall maintain a complete and accurate set of files, books, documents, papers, reports and records of all business activities and operations conducted by PAE, and all photocopies or reproductions thereof, relevant to each restructure transaction attempted or completed under the Mark-to-Market Program or to PAE's performance under this Agreement (all of which shall collectively constitute the "Records"). The PAE shall require its Subcontractors to maintain a complete and accurate set of files, books, documents, papers, reports and records of all business activities and operations conducted by the Subcontractor, and all photocopies or reproductions thereof, relevant to each restructure transaction attempted or completed by the Subcontractor under the Mark-to-Market Program or to Subcontractor's performance of the requirements of this Agreement. The PAE shall maintain at its principal place of business, or a convenient, secure location off-site, the final reports or other final work product and Records prepared by the PAE and its Subcontractors. All Records stored off-site shall be available to the Director upon 48 hours notice to the PAE. All Records collected or prepared by PAE or Subcontractors, or related to a Debt Restructuring Transaction, or related to PAE's performance under this Agreement shall be the property of the Director and shall not, in any manner, be construed to be the property of the PAE.

**(b) Production of Records to Director.** PAE shall promptly forward such Records as the Director shall require.

**15.1.2 Generally Accepted Accounting Principles.** PAE shall maintain all accounts and prepare the

related financial statements and reports required under this Agreement in accordance with generally accepted accounting principles applied on a consistent basis and formatted in a manner acceptable to HUD.

**15.1.3 Retention of Records.** Retention and disposition of Records shall be governed by Section 16.4.3.

**15.1.4 Director's Right to Examine Books and Records and to Audit.**

**(a) Access to Books and Records.** At all times during the Term of this Agreement and at all times during the three (3) year period following the Expiration or Termination of this Agreement, Director and its duly authorized agents, representatives or employees may, upon at least forty-eight (48) hours notice enter upon the PAE's place of business and during business hours, inspect, audit, and copy: (i) any Records held by the PAE relevant to PAE's performance under this Agreement; and (ii) any Records held by the Subcontractor relevant to PAE's performance under this Agreement. PAE shall not require unreasonable prior notice or otherwise limit the access of the Director or its duly authorized agents, representatives or employees when they seek to perform such examination of the Records held by PAE or any Subcontractors. PAE shall also make available to the Director the appropriate staff for purposes of conducting a records review or for other reasonable purposes. The limitations in this Section 15.1.4(a) regarding access to inspect shall not apply to HUD's Inspector General or the General Accounting Office.

**(b) Subcontracting and Books and Records Access.** PAE agrees to include in subcontracts under this Agreement a clause to the effect that the Director or its duly authorized agents, representatives or employees may, until three years after final payment under the subcontract, at such reasonable times as the Director may determine, inspect, audit and copy any of Subcontractor's Records relevant to their performance related to this Agreement. Such clause shall provide that Subcontractor may require up to 48 hours notice and will not otherwise limit the access of the Director or its duly authorized agents, representatives or employees when they seek to perform such examination of the Records of the Subcontractor.

**(c) Period of Examination.** The periods of access and examination in subsections (a) and (b) above for Records relating to (1) litigation or settlement of claims arising from the performance of this Agreement, or (2) costs and expenses of this Agreement to which the Director or its duly authorized representative shall continue until such appeals, litigation, claims, or exceptions are disposed of.

**15.1.5 Reports.** Subject to 15.2.2, PAE shall have computer software and Internet access which is compatible with HUD's in order to generate the reports required by HUD. PAE shall timely provide to the Director all information and documentation requested by the Director from time to time, in accordance with the reporting requirements as outlined in the Operating Procedures Guide, to monitor the Mark-to-Market Program, PAE's duties under this Agreement, or in order to fulfill HUD's reporting requirements under MAHRA and in order to respond to congressional and other inquiries. The Director may require the PAE to meet with, submit additional reports, and/or participate in telephone conference

calls with the Director to determine the status of each Project Restructuring. Within thirty (30) Days after the Termination or Expiration of this Agreement, PAE shall prepare and deliver to the Director a final report that sets forth, among other things, a summary of PAE's experience under this Agreement and PAE's evaluation and recommendations based on its participation in the Mark-to-Market Program.

## **15.2. Computer Systems.**

**15.2.1 Systems and Services Provided by the PAE.** The PAE shall provide and maintain in good working order all computer equipment necessary to perform the duties required by this Agreement. The PAE shall provide the hardware, software and Internet capability to successfully electronically transmit restructuring data to the Director. To the extent that the Director's requirements change, to the extent reasonable the Director will cooperate with the PAE to provide sufficient time and support to ensure that PAE's hardware, software and Internet capability are sufficiently compatible to assure the successful transmission of restructuring data, and to remedy any technological difficulties. In the event that, due to technical difficulties, it becomes temporarily impossible to successfully electronically transmit restructuring data, the PAE may submit such data or documents via overnight courier and shall submit such data electronically as soon as practicable.

**15.2.2 Proprietary Interest and License in Software and Systems.** The Director shall have (a) the exclusive and absolute right, title and interest in and to all accounting and reporting systems and software owned by the Director or Secretary, or otherwise obtained or developed by the Director or Secretary at the Director's or Secretary's expense, and furnished to PAE for use in the performance of PAE's services under this Agreement, and (b) the right during the Term and for a period of three (3) years after the Expiration or Termination of this Agreement, and without additional cost to the Director, to use, for Mark-to-Market Program purposes, solely on its own behalf, any and all accounting or reporting systems or software owned by PAE, or otherwise obtained or developed by PAE at PAE's expense for use in the performance of PAE's services under this Agreement subject, however, to any restrictions, limitations or prohibitions in the contracts between the PAE and the Subcontractors which provide such systems or software. The PAE will provide and maintain, at its expense, a computer system that is compatible to the computer system currently used by OMHAR. The Director will provide, at his expense, any hardware or software that is more advanced than or is in addition to the hardware or software required by Attachment 2 hereto. The limitations relating to the three year period shall not apply to HUD's Inspector General.

## **ARTICLE 16 -- TERMINATION OF AGREEMENT; PROCEDURES UPON TERMINATION OR EXPIRATION OF AGREEMENT**

**16.1 Termination by the Director for Cause.** Director may terminate this Agreement for cause upon written notice to PAE if the Director determines that any of the following events of default have occurred:

**16.1.1** The PAE has made a false claim for reimbursement of costs under this Agreement or has made a statement to the Director or Secretary that contains an untrue material fact or fails to contain a material fact necessary to make the statements made not misleading, whether or not PAE has made such a

statement to the Director or Secretary prior to the Effective Date or during the Term of this Agreement;

**16.1.2** A material adverse change has occurred in the financial condition of PAE that affects or is likely to adversely affect PAE's performance under this Agreement;

**16.1.3** A material adverse change has occurred in PAE's ability or capacity to perform this Agreement;

**16.1.4** PAE files a petition for bankruptcy, reorganization or arrangement under any Federal or State statute, or makes an assignment for the benefit of creditors or takes advantage of any insolvency statute or similar statute, or if a receiver or trustee is appointed for the property and assets of PAE and such receivership is not discharged within sixty (60) Days of such appointment;

**16.1.5** PAE or a principal thereof becomes ineligible to contract with the Director under applicable laws and regulations or is the subject of any Federal or State debarment or suspension proceeding or similar administrative sanction or is indicted or convicted of any criminal offense.

**16.1.6** PAE fails to perform any of its duties pursuant to and in accordance with Article 5 hereof or any other term, condition or obligation pursuant to and in accordance with this Agreement or fails to comply with, adhere to or follow HUD's statutes and Regulations, including the Operating Procedures Guide, all of which are applicable to this Agreement.

**16.1.7** PAE, or those acting on its behalf, (including Subcontractors) takes any action: (i) which is not permitted by this Agreement or not in accordance with PAE's responsibilities in ensuring performance of the Restructuring Commitment executed by the Director or the Subsidy Restructuring Recommendation executed by the Director; (ii) which is not within the scope of PAE's duties under this Agreement; (iii) which is not within PAE's delegated authority under this Agreement; (iv) which amends any document which is a part of this Agreement or incorporated in this Agreement without the Director's approval; (v) which fails to comply with HUD's statutes and Regulations; or (vi) which would constitute a violation of any Federal, State or local law.

**16.1.8** PAE has committed an act or acts of negligence or willful misconduct in the performance of its duties under this Agreement.

**16.1.9** PAE is in material default in the performance of its obligations under this Agreement.

**16.2 Payment Upon Termination for Cause.** In the event this Agreement is terminated for cause, the PAE shall be paid amounts due under the provisions of Articles 9, 10, 11, 12 and 14 for Services performed. Notwithstanding the previous sentence or any other provision of this Agreement, the Director may, in such event, at his option, retain any Base Fee, Incentive Fee or reimbursement expenses accrued but not yet paid, and be relieved of any obligation under Article 10 to pay PAE a future Base Fee, Incentive Fee or reimbursement fees.



In no event shall the amount of any sum retained by the Director under this Article 16 limit the amount that the Director may claim and recover against PAE in connection with any claim the Director may assert against PAE for damages due under this Agreement. The Director also retains the right to set off and recoup any payments made to the PAE which were not earned. PAE may make an appeal to the Director for reconsideration of fee payments withheld by the Director should the PAE disagree with the Director's decision to withhold fees.

**16.3 Right of Director to Terminate for Convenience.** The Director may, at his option and at any time in accordance with applicable law, terminate this Agreement regardless of whether PAE is in default in the performance of any of its obligations under this Agreement if such Termination is in the best interests of the Federal government. In the event the Director terminates this Agreement for convenience, the Director shall pay the PAE for its Services an amount equal to the percentage of the Base Fee next due pursuant to the provisions of Article 10, plus reimbursement amounts due under Articles 9, 10, 11, 12 and 14.

#### **16.4 Procedures for Termination.**

**16.4.1 Notice for Termination for Cause.** The Director shall notify the PAE in writing of a default of this Agreement under Section 16.1. The Director shall provide the PAE with ten (10) Days to cure the default, however, the Director may agree to extend the cure period. If, at the end of the cure period, the Director determines that the violation has not been cured, the Termination of this Agreement shall be effective immediately.

**16.4.2 Notice for Termination for Convenience.** In the event the Director wishes to terminate this Agreement for reasons of convenience, the Director shall provide the PAE with twenty (20) Days advance written notice of the Termination. The Termination will be effective at the end of the twenty (20) Day period.

**16.4.3. Books and Records.** Upon the Expiration or upon receipt of notice of Termination of this Agreement, PAE, as directed by the Director, either will immediately deliver all Records to the control of the Director or Director's authorized agent at Director's sole expense, or will hold the Records for up to a three (3) year period. During this period, PAE shall continue to maintain as Records relevant to its performance under this Agreement at its principal place of business, or a convenient, secure location off-site, which shall be accessible to the Director upon 48 hours notice to the PAE. Director shall have the right to enter upon PAE's place of business or off-site location to take physical possession and control of the Records, and the Director may restrain any breach of the provisions of this Section 16.4.3 by injunction. PAE may, at its own expense, make and maintain copies of the Records for its files for the period up to three (3) years following Expiration or Termination of this Agreement, subject to PAE's obligation to maintain the confidentiality of all Nonpublic Information in such materials in accordance with Federal law, HUD regulations and State law. In all events, PAE shall at the end of the three (3) year period following Expiration or Termination of this Agreement deliver the Records to the Director or Director's authorized agent at Director's sole expense, unless it has previously done so at the Director's request. PAE expressly waives all right to any statutory or possessor lien on the Records. PAE may request the Director to return to PAE copies of any Records that have been previously delivered to the Director under this section and have not been destroyed, for a limited period of time, as necessary for

PAE to satisfy state law audit and other governmental requirements. PAE's request shall identify the Records and the governmental requirement for which the Records are sought.

**16.4.4 Duty of Cooperation.** Upon the Expiration or Termination of this Agreement, PAE will cooperate with the Director to effect an efficient and smooth transition of responsibility with respect to the Projects.

**16.5 Effect of Termination.** Upon the Termination of this Agreement for any reason, the Director's appointment of PAE shall terminate, but the Termination of this Agreement shall not affect any right, obligation or liability that has accrued under this Agreement. Upon Termination, the Director shall take over all responsibility for restructuring any Project mortgages or rents that remain to be processed under this Agreement.

**16.6 Further Assurances.** PAE shall cooperate with the Director after Termination of this Agreement to execute and deliver such documents as the Director may request to carry out the

terms and provisions of this Agreement, provided that such documents shall not increase the PAE's liabilities or diminish the PAE's rights under this Agreement.

## **ARTICLE 17 -- MISCELLANEOUS PROVISIONS**

**17.1 Assignment; Binding Effect.** PAE may not assign or transfer this Agreement or any rights or benefits under this Agreement to any person or entity without the prior written approval of the Director. Any assignment made without receiving prior written approval of the Director shall be void. All of the covenants, conditions and obligations contained in this Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of Director and PAE.

**17.2 Notices.** All notices, requests, demands and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be sent by hand delivery, overnight courier, registered or certified mail, return receipt requested, postage prepaid or facsimile (with the original sent within twenty-four (24) hours of such facsimile by hand-delivery, overnight courier or by registered or certified mail, return receipt requested and postage prepaid:

**17.2.1 If to Director of OMHAR, to:**

Director  
 Office of Multifamily Housing Assistance Restructuring  
 1280 Maryland Avenue, S.W.  
 Suite 4000  
 Washington, D.C. 20024  
 Facsimile 202 708-5494

**and to:**

Deputy Director for Restructuring  
 Office of Multifamily Housing Assistance Restructuring  
 1280 Maryland Avenue, S.W.  
 Suite 4000  
 Washington, DC 20024  
 Facsimile 202 708-5494

**with a copy in the case of disputes or legal matters to:**

Associate General Counsel for Insured Housing  
 U.S. Department of Housing and Urban Development  
 451 Seventh Street, S.W.  
 Room 9226  
 Washington, D.C. 20410  
 Facsimile 202 708-2212

**17.2.2 If to PAE to:**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

All such notices, requests, demands and other communications shall be effective upon the actual delivery thereof to the address identified pursuant to this Section (or the refusal thereof by the addressee at the address identified pursuant to this Section) Either party may change it's address for purposes of this Section by sending to the other party to this Agreement written notice of the new address in the manner specified in this Section Each party shall be responsible for notifying the other of any change of address.

**17.3 Nondiscrimination.** PAE agrees that during the performance of this Agreement:

**17.3.1** PAE shall not violate Federal or state laws that prohibit discrimination against any employee or applicant for employment because of race, color, religion, sex, age, mental or physical disability or national origin.

**17.3.2** PAE shall take affirmative action to comply with all Federal and state laws to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, mental or physical disability or national origin. Such action shall include, but not be limited to: (i) employment; (ii) upgrading; (iii) demotion; (iv) transfer; (v) recruitment or recruitment advertising; (vi) layoff or Termination's; (vii) rates of pay or other forms of compensation; and (viii) selection for training, including apprenticeship.

**17.3.3** PAE shall include the terms and conditions of Sections 17.3.1 and 17.3.2 in every Subcontract so that these terms and conditions will be binding upon each Subcontractor.

**17.4 Severability.** If any provision of this Agreement shall be determined to be invalid or unenforceable, the remaining provisions of this Agreement shall not be affected thereby, and every provision of this Agreement shall remain in full force and effect and enforceable to the fullest extent permitted by law.

**17.5 Headings.** The headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of any article or Section of this Agreement.

**17.6 Survival.** The provisions contained in this Agreement, including the express obligations contained in Articles 11 and 12, which, by their terms, require their performance after the Expiration or Termination of this Agreement shall be enforceable notwithstanding the Expiration or other Termination of this Agreement.

**17.7 Waiver.** Neither party's waiver of the other's breach of any term, covenant or condition contained in this Agreement shall be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition in this Agreement.

**17.8 Director's and PAE's Remedies Not Exclusive.** The rights and remedies of the Director and the PAE provided in the Agreement are cumulative and not exclusive and are in addition to any other legal and administrative rights and remedies now or hereafter provided by law.

**17.9 Advertising and Publicity.** The PAE shall not issue or sponsor, and it will require its Teaming Partner or Subcontractors, if any, not to issue or sponsor, any advertising or publicity that states or implies, either directly or indirectly, that Director endorses, recommends or prefers the PAE's, Teaming Partner's or Subcontractor's Services. The PAE shall not use, and shall require that its Teaming or Subcontractor s not use, the HUD or FHA logo in any fashion without Director's prior written approval. The Director shall not issue or sponsor any advertising or publicity that states or implies, either directly or indirectly, that PAE, its Teaming Partner or Subcontractors endorse, recommend or prefer the Director's Services.

**17.10 Notice of Claims under this Agreement.** Director and PAE each agree that it will provide the other with written notice of any claim it may have against the other arising under or in connection with this Agreement, that it will refrain from filing suit with respect to any such dispute for a period of

sixty (60) Days following the other's receipt of such notice and that it will promptly meet with the other after providing such notice in a good faith effort to resolve the dispute.

**17.11 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**17.12 Governing Law.** This Agreement shall be governed by and construed in accordance with all applicable Federal laws and regulations.

**17.13 Communications with the Media.** Neither PAE nor its employees shall communicate with, or provide information to, members of the press or other media regarding its agreement with, or work for, the Director without the Director's prior approval, which will not be unreasonably withheld. Director and the PAE will establish procedures to expedite compliance with this Section 17.13. Any requests from press or media personnel which are requests for the production of documents shall be handled pursuant to Article 14.

**17.14 Force Majeure.** Director and PAE shall be excused for the period of any delay in the performance of any obligations under this Agreement when prevented from performing such obligations by cause or causes beyond their reasonable control, including, without limitation, civil commotion, war, invasion, rebellion, hostilities, military or usurped power, sabotage, pestilence, riots, fire or other casualty or acts of God.

**17.15 Director's Approval.** For purposes of this Agreement, any requirement for approval of the Director shall be read to require written approval by the Mark-to-Market Program Manager or other Authorized OMHAR Representative.

**17.16 Multiple Contracts or Engagements.** If, at any time during the Term of this Agreement, PAE is performing services for Director under the Mark-to-Market Program and pursuant to another Restructuring Plan or other Agreement, PAE shall separately maintain Records and Operating Accounts for each such agreement, and shall otherwise segregate matters pertaining to its performance under each such agreement.

**17.17 Third Party Beneficiaries.** PAE and Director agree that there are no parties which are third party beneficiaries to this Agreement.

**17.18 Joint and Several Liability.** If PAE is organized as a joint venture, the liability of the joint venturers in connection with all duties, obligations and liabilities under this Agreement shall be joint and several.

**17.19 Entire Agreement; Modification.** This Agreement and the Exhibits hereto, which are hereby incorporated by reference, constitute the entire agreement between the parties. If there is any inconsistency between the terms of this Agreement and any other attachments or exhibits hereto, the terms of this Agreement shall govern. There are no promises or other agreements, oral or written, express or implied, between them other than as set forth in this Agreement. No change or modification of, or waiver under, this Agreement shall be valid unless it is in writing and signed by a duly authorized

representative of the party against which it is to be enforced.

**IN WITNESS WHEREOF**, each party has caused this instrument to be signed on its behalf by its duly authorized agent.

**Witness:**

\_\_\_\_\_

**DEPARTMENT of HOUSING  
& URBAN DEVELOPMENT**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Witness:**

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Exhibit 1****SCHEDULE OF PROJECTS**



**Exhibit 2****Operating Procedures Guide**

**Exhibit 3****KEY PERSONNEL OF THE PAE AND ALLOCATION OF TIME**

<b>PAE Personnel</b>	<b>Percentage of Time Allocated to Mark-to-Market</b>
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<b>1)</b>	
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<b>2)</b>	
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<b>3)</b>	
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<b>4)</b>	
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<b>5)</b>	
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<b>6)</b>	
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**ATTACHMENT 1:****PAE's Debt Restructuring Commitment Review Procedure**

**ATTACHMENT 2:****PAE-Furnished Computer Equipment****Hardware:**

- Minimum processor = Pentium / 100 MHz or equivalent (233 MHz or higher is recommended)
- Min. hard drive size = 320 MB (2.0 GB is recommended)
- Min. RAM = 16 MB (64 MB recommended)
- Video / Screen Resolution = 800x600 w/ 256 colors
- Internet Service Provider (ISP) connection with min. speed of 28.8 bps

**Software:**

- Operating System = Windows 95 is recommended
- Word Processor = Microsoft Word v. 6.0 (or ability to read/write/save as MS Word 6.0 or 7.0 files; MS Word 95 is recommended)
- Spreadsheet = MS Excel 5.0 (or ability to read/write/save as MS Excel 5.0 or 7.0 files; MS Excel 95 is recommended)
- Web Browser = Netscape 4.0 or higher (incl. forms, java, 128-bit encryption)  
OR = MS Internet Explorer 4.0 or higher (incl. forms, java, 128-bit encryption)

The contractor must provide facsimile and fax/telephone line for the transmission and receipt of Debt Restructuring information.